Nos. 76-877 and 76-898

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES G. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ADRIAN WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. No. 76-877, Apps. A and E)[1] are not reported. The district court's memorandum on petitioners' motion to strike and exclude evidence (Pet. App. D) is not reported.

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[1]Unless otherwise indicated, references herein to the opinions of the court of appeals will be to the appendices in No. 76-877.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976. A petition for rehearing was denied and the original panel decision modified on November 29, 1976 (Pet. App. B). The petitions for a writ of certiorari were filed on December 27 and December 29, 1976, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a co-conspirator voluntarily consented to the recording of his conversations with petitioners.

2. Whether the evidence showed entrapment of petitioner Wilson.

3. Whether the evidence was sufficient to support the conviction of petitioner Ryan.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of using interstate commerce to promote an unlawful activity (bribery of a local official) and of conspiring to commit that offense (18 U.S.C. 1952, 2, 371). Petitioner Ryan was sentenced to concurrent five-year terms of imprisonment. Petitioner Wilson was sentenced to concurrent 90-day prison terms and was fined $10,000 for each offense.[2] A panel of the court of appeals affirmed (Pet. App. A), then modified its original decision at the time it denied rehearing; the full court denied rehearing *en banc*, two judges dissenting (Pet. App. B).

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[2]A third co-defendant, Bernard Zeldin, was also convicted, sentenced to concurrent one-year prison terms, and fined $10,000 on each count. His petition for certiorari from the original decision (No. 76-96) was denied November 8, 1976.

1. Petitioner Wilson, who resided in Los Angeles, California, owned a parcel of land in Clark County, Nevada. Wilson sought a favorable rezoning of this property by the Clark County Board of Commissioners, then consisting of commissioners Broadbent, Leavitt, Brennan, Wiesner and petitioner Ryan. Mira Mizera, a Nevada realtor, offered his services to Wilson when he learned of the latter's desire to rezone and develop his Clark County property. In a January 1972 meeting in Los Angeles, Mizera told Wilson that rezoning could be accomplished only if the county commissioners were given "political contributions" (1B Tr. 16-18).[3] He suggested a $10,000 figure and volunteered to contact the commission members (1B Tr. 19-22). Wilson also introduced Mizera to Bernard Zeldin, a local businessman who was to develop the property after the rezoning (Pet. App. E39a).

Subsequently, Mizera met with petitioner Ryan to discuss Wilson's rezoning plan. In a second meeting, in February 1972, he told Ryan that the latter would receive a $10,000 contribution for his assistance (1B Tr. 21-27). In March 1972 an advisory planning commission voted against the proposed zoning change, and Ryan told Mizera to contact the other county commissioners himself, because otherwise they might think that Ryan would be keeping more of the money than they would receive (1B Tr. 29; 1C Tr. 287).

At this point, Mizera decided to see Commissioners Brennan and Leavitt, who were of the same party as Ryan, and might therefore vote as a group. However,

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[3]"1A Tr.," etc., refers to the volume (1A through 1J) and page of the transcript of the testimony of particular witnesses on particular trial days, or of other proceedings. Volume 1G consisted of volumes IV through VII of trial testimony and is cited, *e.g.*, "1G IV Tr."

Wilson later told Mizera to contact all five Commissioners, though with only $10,000 available, this would reduce each Commissioner's cut to $2,000 (1B Tr. 31-34; 1C Tr. 293, 353-354). Mizera did see all the commissioners, but none—save Ryan—was receptive to his offer of money. Brennan and Mizera both testified that at a second meeting between the two, Mizera had had to reduce his offer from $3,000 to $2,000 because Wilson wanted everybody to get $2,000 (1B Tr. 44; 1G IV Tr. 633, 641).[4] At a second meeting with Commissioner Wiesner, however, Mizera told him that Wilson would raise his offer to $3,000 (1G Tr. IV 612).

Mizera contacted Commissioner Broadbent on April 20, 1972, to offer him a $2,000 contribution, and the commissioner feigned interest. When Mizera left, Broadbent immediately called the State Attorney General's Office. He then met with state investigators and agreed to have his subsequent telephone or face-to-face conversations with Mizera recorded (1E Tr. 383, 386, 393, 443, 405, 407). Mizera met with Broadbent on April 27, 1972, and told him that all other commissioners had been contacted and that Wilson hoped to give each $2,000 (1E Tr. 397-401). At another meeting with Broadbent on May 2, Mizera told the commissioner that Ryan had originally suggested that he see all the commissioners (1E Tr. 407-413).

On April 26 or 27, 1972, Wilson secured the services of a Nevada attorney, William Morris, to help pursue the

[4]All the commissioners other than petitioner Ryan indicated that they would examine the zoning proposal on its merits. Brennan and Broadbent eventually voted against the zoning change, while Leavitt, Wiesner, and Ryan supported it (1B Tr. 42-44; 1G IV Tr. 630-641; 1G IV Tr. 569-595, 612).

rezoning application. Mizera told Broadbent about Morris, who in fact was a close friend of the commissioner. Acting on his own, without informing the state authorities, Broadbent sent word to Morris that he should withdraw, and the attorney thereupon terminated his representation of Wilson (1E Tr. 432-468; 1G VIII Tr. 1551-1578).

After Mizera had contacted the other commissioners, he met again with Ryan, told him of his efforts, and indicated that since the $10,000 from Wilson would have to be portioned out, Ryan's share would only be $2,000 rather than the $10,000 originally promised. Ryan became angry and left the meeting (1B Tr. 36; 1C Tr. 298). At a subsequent meeting on May 6, 1972, to mollify the angry Ryan, Mizera raised the offer to $3,000 and even told Ryan that he did not have to vote for the measure if it seemed otherwise likely to pass (1B Tr. 37-39; 1C Tr. 298-300).

At this point in the investigation, the state agents commenced wire interception of Mizera's office and home telephones, pursuant to a state court order under Nevada law. The wire interception was to last from May 5 until May 19, 1972 (Pet. App. E42a).

Meanwhile, on May 9, 1972, petitioner Wilson applied in Los Angeles for a $12,000 loan (1G Tr. IV. 561). The next day, May 10, 1972, Mizera again called Broadbent to confirm his support for the rezoning and told him, somewhat ~~inaccurately~~ that the $10,000 had actually been obtained and that co-defendant Zeldin had it (1E Tr. 419-420). On May 16, at the request of the state investigators, Broadbent told Mizera that he could no longer support the rezoning plan (1E Tr. 424, 425). Mizera contacted Ryan and persuaded him to make the rezoning motion in return for $5,000 (1B Tr. 61; 1C 302-304, 356).

Mizera subsequently called co-defendant Zeldin in Los Angeles, told him that all was well, and asked him to make certain that Wilson would have the money in Las Vegas after the Board of Commissioners met (1B Tr. 104, 105). The same day, May 15, 1972, Zeldin went to Wilson's office in Los Angeles and received some $11,000 in cash from him in $100 bills. Zeldin had cautioned Wilson that the payment would have to be in cash to avoid possible exposure of the scheme (1G Tr. VIII, 1455, 89). This $11,000 was to be delivered to Mizera only if the zoning proposal passed (1G VIII, Tr. 1456-1490).

2. Through Broadbent's cooperation, the state investigators were now aware of the general nature of the scheme. They concluded, however, that Mizera's assistance was necessary to discover all participants in the affair. On May 19, 1972, state agents disclosed to Mizera their investigation of the developing bribe scheme. They first read to him the relevant Nevada bribery statute and described some of the evidence they had gathered against him. They offered him immunity from prosecution if he cooperated; this would permit him to retain his real estate license. The agents also told him that if he did not help secure sufficient evidence, he would be indicted; that he might go to jail for as long as 10 years; that his health would suffer in jail; that if he cooperated his friends, petitioner and Wilson, would be "kept out of it"; and that if he consulted an attorney his usefulness would be over. After bargaining during the 45 minute meeting, Mizera agreed to cooperate, and thereafter his telephone and personal conversations were recorded with his consent (Pet. App. D25a-26a; Pet. App. E44a-45a).

Wilson came to Las Vegas on May 21, 1972 and met with Mizera. The latter told him that Ryan would make

the motion for rezoning and would receive $5,000 (1B Tr. 79, 80). The Board of Commissioners met on May 22, 1972, and approved the rezoning measure by a vote of three to two. After the meeting, Mizera again met with Wilson and Zeldin. Wilson told Mizera that he had done a good job, and Zeldin then handed him some $8,000 (1B Tr. 111-113). Bank wrappers on the bills showed that the currency came from the Security Pacific Bank in Los Angeles, where Wilson had borrowed the funds (1D Tr. 12). The next day, Mizera met with Ryan, gave him the $5,000 promised, and then signaled Nevada agents, who moved in and arrested the commissioner (1B Tr. 118-126).

ARGUMENT

1. Petitioners argue that Mizera did not validly consent, as required by 18 U.S.C. 2511(2)(c), to have his conversations with his co-conspirators recorded, because his agreement to permit the recordings was the product of manifest overreaching by the state agents (see, *e.g.*, Pet. No. 76-898, pp. 23-24). The two courts below found to the contrary (Pet. App. D; Pet. App. E49a), and there is ample support for their finding that Mizera's consent was voluntary. There is no reason for this Court to examine further this essentially factual determination.

The agents' conversations with Mizera on May 19, 1972, were recorded on tapes considered by the district court; they were also described by Mizera on the stand. The district court found that the state agents confronted Mizera with the evidence showing that he was involved in a scheme to bribe the Commissioners (Pet. App. D26a-27a):

> When Mizera asked if he might call an attorney, state officers responded that, because they feared that an attorney might notify the Commissioners of the investigation, and that because some attorneys

might thereby compromise Mizera's position, they did not want him to contact an attorney. They quickly added that they were not saying he could not call an attorney, but were saying only that if he did, any offer of a deal was over. (It might be added parenthetically that testimony at the trial has indicated that intimations of the investigation were in fact given to some of the Commissioners by a local attorney, and that the agents' fears were not totally unfounded). The agents outlined some of the disadvantages of an arrest and conviction, noting that Mizera would face ten years in prison, that it would have an impact on his family, that he would lose his license and his income derived therefrom, and stated that he would be unable to go back to New York for a specialist's treatment of his headaches. The agents were candid about Mizera's position, stating that, in view of the alternatives, he was not in a position to bargain if he was to receive immunity. Once assured that he would be provided with protection from possible threats to his life because of his cooperation, Mizera agreed to cooperate. Mizera's decision was made in a matter of minutes from the time he was confronted. The tapes reflect the fact that the agents were direct but not vociferously overbearing.

On the stand in the instant case, Mizera testified that he placed a condition upon his cooperation: that the Attorney General of Nevada not prosecute Adrian Wilson. Thus Mizera did bargain with the agents. Mizera also testified that he was not fearful of a prison term, but he *subjectively* concluded that he would not get the medical care he felt he needed in prison. He stated that the agents never said that medicine would not be provided him if he refused

to cooperate. Mizera, under cross-examination, indicated that he clearly understood the agents to say that, while he could call an attorney if he wished, it would mean that no deal would be offered him. While he stated he consented to cooperate with reluctance, Mizera nevertheless testified that he agreed to cooperate and went with the agents voluntarily.

Finally, although the tape records made during the meetings of that day show that Mizera had occasional reluctant afterthoughts about cooperating, the major portions of the recordings reveal Mizera freely volunteering suggestions on how to proceed with the investigation.

Petitioners contend that on these facts the courts below should have held that Mizera's consent resulted from unconscionable psychological coercion (Pet. No. 76-877, p. 11; Pet. No. 76-898, p. 27). But as this Court noted in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." On the facts found by the court below, the totality of circumstances do not disclose police conduct that is either outrageous or coercive and that warrants treating Mizera's continuing consent to the recording of his conversations for several days after he was approached by the agents as involuntary. Cf. *United States* v. *Bonanno*, 487 F. 2d 654, 658 (C.A. 2).

While the court of appeals did not "condone the tactics used to gain Mizera's co-operation" (Pet. App. A10a), it correctly held that the state agents' conduct was not "so outrageous" as to violate due process. *United States* v. *Russell*, 411 U.S. 423, 431. This is not a case in which the

innocent associate of a suspect is browbeaten with threats of criminal punishment having no basis in fact, in order to secure his cooperation. The evidence with which the agents confronted Mizera was accurate. Even more important, there was no causal connection between the agents' alleged misconduct and Mizera's decision to cooperate. Mizera's predicament arose not from the agents' statements but simply from his awareness that the state authorities knew of his involvement in the bribery scheme. As the court below noted, "nothing said or done thereafter was likely to change his decision" (Pet. App. A11a). The mere fact that an individual's cooperation is generated by a desire for leniency does not, of course, render that cooperation involuntary. Just as a guilty plea is not void when made to secure a lesser sentence,[5] so too a consent to interception of oral communications is valid when motivated by similar considerations.[6]

Petitioners contend that Mizera's consent should be held invalid because a confession procured from Mizera under such circumstances would have been inadmissible against him.[7] While we do not concede the correctness of their premise (cf. *Oregon* v. *Mathiason*, No. 76-201, decided January 25, 1977), the criteria for evaluating the voluntariness of a confession and the validity of a consent to recording conversations under 18 U.S.C. 2511(2)(c)

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[5]See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 751.

[6]See, *e.g.*, *United States* v. *Osser*, 483 F. 2d 727 (C.A. 3), certiorari denied, 414 U.S. 1028; *United States* v. *Dowdy*, 479 F. 2d 213 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176 (C.A. D.C.), certiorari denied, 402 U.S. 950.

[7]Insofar as their claim may be predicated upon an alleged violation of Mizera's due process rights rather than petitioners' own rights under Section 2511, petitioners lack standing to assert Mizera's rights vicariously.

are not properly equated in this fashion, and petitioners have cited no case holding that they should be so equated. The special care that is taken in determining the admissibility of allegedly involuntary confessions is, in substantial part, the product of considerations that are inapplicable in assessing the means used to enlist the cooperation of a participant in criminal activity in the continuing investigation of the crimes.

This Court long ago characterized the bar against the admission of confessions obtained by improper threats or inducements as being based on the principle that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction" (*Bram* v. *United States*, 168 U.S. 532, 547). At a minimum, confession cases necessarily implicate concerns derived from the Fifth Amendment's guarantee that no person shall be compelled to give evidence against himself. See *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 374. Moreover, as a statement against interest, the evidentiary reliability of a confession is suspect if the confession was procured under circumstances indicating that it was the product of an impaired capacity for self-determination. See *Michigan* v. *Tucker*, 417 U.S. 433, 447-449.

These concerns are not present in the case of a consent by a non-defendant to the recording of conversations with suspected offenders, granted after the authorities have confronted him, in a non-custodial situation, with the evidence of his own wrongdoing. Criminal investigation often requires the cooperation of participants in suspected illegal schemes. As the court of appeals noted, requiring such a participant "to face up to the real world in order to obtain his cooperation or to obtain

admissions of guilt or a plea of guilty is permissible under our system" (Pet. App. E47a).[8]

2. Petitioner Wilson argues (Pet. No. 76-898, pp. 19-23) that he was entrapped into committing the offenses charged against him. The court below found, after a careful persual of the record, that this contention is without substance (Pet. App. E45a-46a). Entrapment occurs only when the authorities implant a criminal design in the mind of a defendant previously without predisposition to commit the crime. *United States* v. *Russell*, 411 U.S. 423; *Hampton* v. *United States*, 425 U.S. 484. In this case, the evidence showed that Wilson was an active participant before the authorities even became aware of the bribery activity through Commissioner Broadbent's information or Mizera's cooperation. In January of 1972, Wilson had agreed that Mizera should approach the Commissioners with an offer of monetary assistance, and when petitioner Ryan indicated that he would not personally contact all the Commissioners himself, Wilson told Mizera to contact each Commissioner, rather than just the three majority party members on the county board (1B Tr. 19-22, 31-34; 1C Tr. 293, 353-354).

Nor is there any merit to the suggestion that Broadbent's caution to attorney Morris to terminate his representation of Wilson somehow prevented Wilson from receiving effective assistance of counsel that would have dissuaded him from engaging in criminal activity. As the court of appeals noted, there is no evidence that Broadbent was acting for the State in warning Morris (Pet. App. E48a-49a). Further, Wilson's predisposition to commit the

[8]The quoted language appears in the panel opinion as revised when a majority of the Ninth Circuit's active judges denied rehearing *en banc* (Pet. App. E50a).

bribery offense was firmly established. Prior to retaining Morris, he had authorized Mizera to contact the Commissioners, and, after Morris was retained, Mizera told Broadbent that notwithstanding Morris's intended role in the zoning proceeding, Wilson would still be willing to pay for the assistance of the Commissioners (1E Tr. 397-401).[9]

3. There is no merit to petitioner Ryan's contention (Pet. No. 76-877, p. 18) that the evidence was insufficient to support his conviction. Contrary to his characterization of the opinion below, the Ninth Circuit did not affirm the conviction merely because Ryan failed to "rebuff" Mizera's bribe offer. Rather, the court below correctly determined that Ryan affirmatively accepted the bribe and agreed to push for the rezoning change as the *quid pro quo* (Pet. App. E49a):

> At the second of these meetings, in February of 1972, campaign contributions in exchange for a favorable vote were mentioned. Ryan did not repudiate the scheme at that time, as Broadbent had done upon first becoming aware of it. Rather, he continued to meet with Mizera concerning this rezoning. While the bribe was not specifically discussed in the March meeting, it is difficult to imagine that Ryan assumed that Mizera had dropped his original proposal. In April of 1972, Ryan did repudiate the plan altogether because his share of the "kitty" had been reduced, but resumed his role in the scheme shortly thereafter, when Mizera told him that he would receive $3,000 rather than the $2,000 originally promised. Finally, on May 17, 1972, Ryan told Mizera that he would make the necessary motion at the commission meeting.

[9]Thus the court of appeals correctly held that Wilson's tendered entrapment instructions were properly rejected (Pet. App. E45a, n. 5).

Nor is there any error in the reasoning of the court below that one charged as an aider and abettor under 18 U.S.C. 2 and 1952 need not be shown to have personally engaged in an interstate activity, so long as the scheme as a whole had the requisite interstate connections (Pet. App. E40a). This no more than restates Section 2(b), which provides that one who "causes an act to be done which if directly performed by him * * * would be an offense * * * is punishable as a principal."[10]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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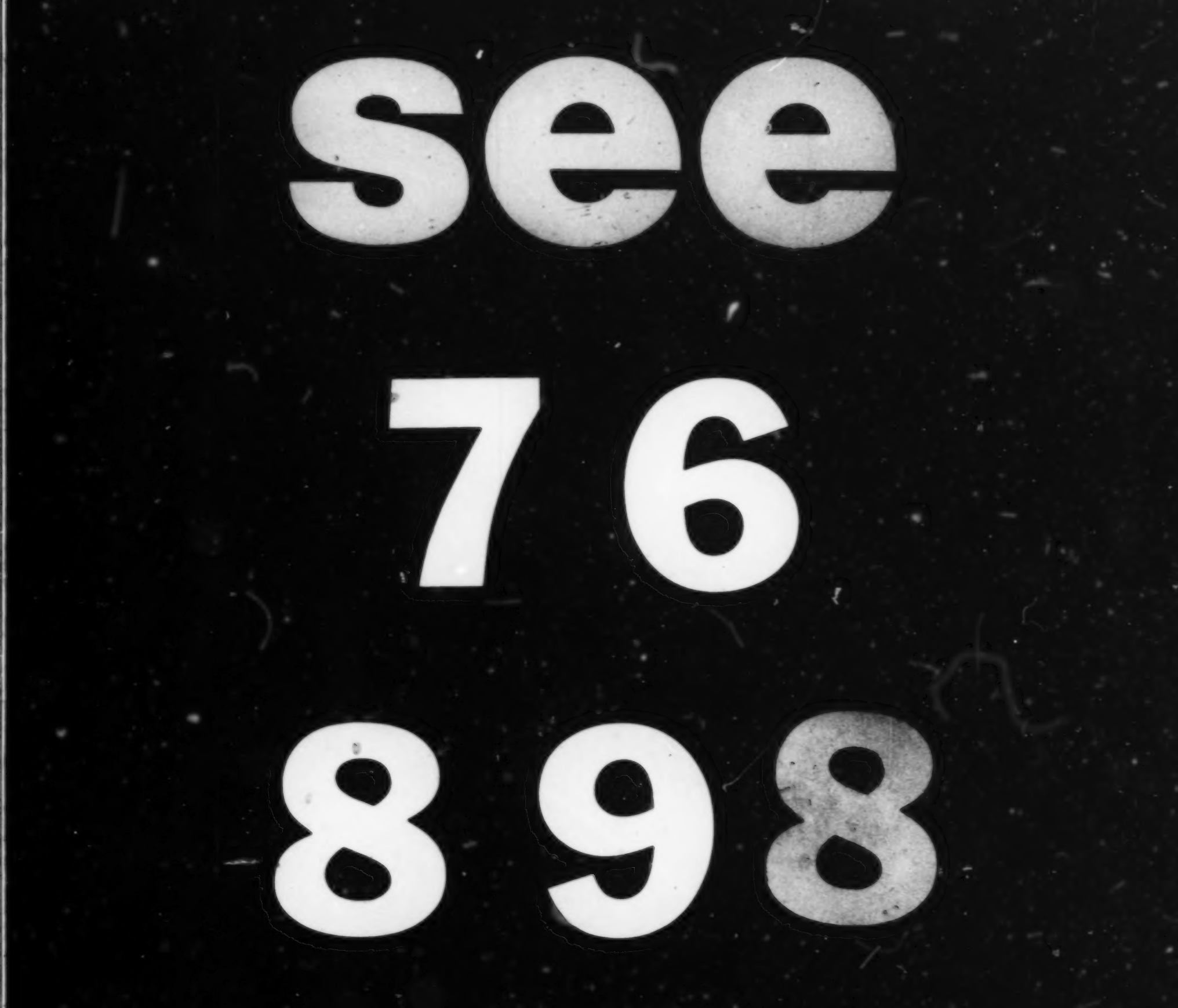
[10]Section 1952 is in fact precisely directed against schemes such as that in which petitioners were involved. Petitioners' codefendant and co-conspirator Wilson lived in the adjoining State of California, and in conjunction with him, Mizera and Zeldin made extensive use of interstate facilities to pursue the Nevada bribery plan. Wilson, Mizera, and Zeldin traveled between the States several times in formulating their illicit design, and all three conversed frequently through interstate phone calls. Indeed, Zeldin carried the bribe money from California to Nevada, where it was ultimately given to Commissioner Ryan.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